In the Supreme Court of the United States

OCTOBER TERM, 1924

LUCKENBACH STEAMSHIP COMPANY (INC.) and the United States of America
v.
NORWEGIAN BARQUE "THEKLA" } No. 258

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF THE UNITED STATES

THE PRACTICAL PURPOSES AND APPLICATION OF RULE 53

This court on opinion by Mr. Justice Brandeis in the case of *Washington-Southern Navigation Company* v. *Baltimore & Philadelphia Steamboat Co.*, 263 U. S. 629 (decided January 28, 1924), fully reviews the history and application of old Admiralty Rule 53 and new Rule 50. It has definitely determined (p. 635) that—

> * * * The function of rules is to regulate the practice of the court and to facilitate the transaction of its business. This function embraces, among other things, the regulation of the forms, operation, and effect of process,

> and the prescribing of forms, modes, and times for proceedings. Most rules are merely a formulation of the previous practice of the courts. Occasionally a rule is employed to express in convenient form, as applicable to certain classes of cases, a principle of substantive law which has been established by statute or decisions. *But no rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law. This is true whether the court to which the rules apply be one of law, of equity, or of admiralty.* * * * [Italics ours.]

The purpose of the rule was (p. 638):

> * * * Here, as in England, *the purpose of the provision was declared to be to place the parties on an equality as regards security.* [Italics ours.]

Affirmative relief by a cross libel is in analogy to the cross bill in equity (p. 636).

> * * * Moreover (in England) where the original libel was filed by a nonresident libelant, substituted service in a cross action, by serving his proctor, was not permitted, until this was authorized by a rule of court adopted in 1859. In American courts of admiralty the practice was more liberal. Set-off being of statutory origin and not expressly authorized in admiralty, was rejected here as in England. But Congress conferred upon all federal courts, in 1813, *the right to compel consolidation of causes. The North Star*, 106 U. S. 17, 27. Later, our admiralty courts *recognized the propriety of affording affirmative relief*

by a cross libel, in analogy to the cross-bill in equity. [Italics ours.]

This court in *Ward* v. *Chamberlain*, 21 How. 572, 574 (1858) declared that on a cross libel *in rem* process must be taken out and served in the usual way. The steamer *Bristol*, 4 Ben. 55. In *Crowell* v. *The Theresa Wolf*, 4 Fed. 152, and *Southwestern Transportation Co.* v. *Pittsburg Coal Co.*, 42 Fed. 920, the stay was denied because the counter claim was not a proper subject for a cross libel.

THE LIBEL AND CROSS LIBEL ARE SEPARATE PROCEEDINGS

This court in *The Dove*, 91 U. S. 381, definitely ruled as follows (pp. 383, 384):

> Causes of the kind (libel and cross libel) may be tried together or separately, *as it is obvious that the pleadings in each are complete without any reference to the other.* Nothing is required on the part of the respondent in the original suit beyond his answer, unless he claims that his vessel was injured, and that the collision was occasioned wholly by the fault of the vessel of the original libellant. For all purposes of defence to the charges made by the libellant his answer, if in due form, is sufficient; but if he intends to claim a decree for the damages suffered by his own vessel, then he should file a cross libel. *Damages for injuries to his own vessel can not be decreed to him under an answer to the original libel,* as the answer does not constitute a proper basis for such a decree in favor of the respondent. Consequently, whenever he de-

sires to prefer such a claim he should file an answer to the original libel and institute a *cross action to recover the damage for the injuries sustained by his own vessel.*

Controversies of the kind are usually tried together; and it appears that the two suits in this litigation were so tried in the District Court, and that the District Court came to the conclusion that the cross suit was without merit and dismissed the cross libel; and, inasmuch as the libellant in that suit did not appeal from that decree, the suit is ended and determined. But the determination of that suit by such a decree did not determine the rights of the parties in the original suit; on the contrary, it left the issues in the latter suit just as they would have been had the cross suit never been commenced.

Beyond doubt the final decree dismissing the libel in the cross suit determines that the libellant in that suit is not entitled to recover affirmative damages for any injuries suffered by his vessel in the collision; but it does not dispose of the issues of law or fact involved in the original suit. Instead of that, both parties in the cross suit, if no appeal is taken from the decree in that suit, are remitted to the pleadings in the original suit; and it is undeniable that every issue in those pleadings is open to the parties, just the same as if no cross libel had ever been filed. * * *

* * * Such a decree, if not appealed from, is conclusive that the libellant in the cross suit is not entitled to recover affirmative damages for any injuries received by his own

> vessel; but it does not preclude him from showing in the original suit, if he can, that the collision was the result of inevitable accident, or that it was occasioned by the negligence of those in charge of the other vessel, or that it is a case of mutual fault, where the damages should be divided.

The consolidation of separate and distinct causes and of original actions and cross actions, in Federal courts, is authorized by Section 921 of the Revised Statutes. *The North Star*, 106 U. S. 17; *Adler* v. *Seaman*, 266 Fed. 828, 831. In the *Keystone State*, 185 Fed. 781, 783, Judge Rose, speaking for the Circuit Court of Appeals for the Fourth Circuit, said:

> The libel and cross libel were separate proceedings. They are usually consolidated for purposes of convenience; they are logically distinct.

The libel and cross libel arise out of the same collision. They present separate and distinct causes of action. The one is a claim for damages sustained by the S. S. *Luckenbach;* the other is a claim for damages sustained by the bark *Thekla*.

The rule applied in division of damage cases is settled. Such rule, however, does not determine that the libel and cross libel are the same proceedings. An examination of the transcript of record in the Circuit Court of Appeals discloses that the libel and cross libel were docketed as different proceedings, and the docket entries for each proceeding were kept separate.

ARMY TRANSPORTS NOT SUBJECT TO LIEN LIABILITIES

Since the *Western Maid* opinion, the English courts have sustained the ruling that public vessels do not incur lien responsibilities for collision losses. *The Tervetae* (C. A.) (1922), P. 259; *The Sylvan Arrow* (1923), P. 220.

Neither in England nor this country could the owners of the *Thekla* have maintained an original libel *in rem* against the *Luckenbach*. The cross libel here has proceeded as a libel *in rem* against the army transport. The prayer of the cross libel follows the usual form. It is as follows:

> Wherefore, libellants pray that process in due form of law may issue against the said steamship *F. J. Luckenbach*, her tackle, apparel, and furniture, citing all persons having any right, title, or interest therein to appear and answer on oath all and singular the matters aforesaid, that the said steamship [redacted], may be condemned and sold to pay the claim aforesaid, with interest and costs, and that the libellants may have such other and further relief in the premises as may be just.

As there is no lien responsibility of the army transport *Luckenbach* for the collision losses, upon which theory the cross libel is presented, we can not understand how any affirmative decree can be entered. The cross libel *in rem* must be dismissed because there is no lien responsibility existent. The court did not have jurisdiction over the subject matter of the cross libel. Any theories of consent or vol-

untary appearance in an original proceeding can not create such lien responsibility. The cross libellants, in any view, must establish lien responsibility of the *Luckenbach* before they can secure relief under their cross libel.

THE DISTRICT COURT'S OPINION

The brief of counsel for the *Thekla* adopts the reasoning of the District Court. This reasoning is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Kingdom of Roumania* v. *Guaranty Trust Co.*, 250 Fed. 341, 343.

In re *Patterson-MacDonald Shipbuilding Co.* (C. C. A. 9th Cir.), 293 Fed. 192, 194, the court said (p. 194):

> Our attention has been directed to *The Gloria* (D. C.), 286 Fed. 188. This was an admiralty case, and for that reason is perhaps inapplicable here; but, if it is an authority in favor of the power of a court to enter judgment against a foreign government, it is only necessary to say that it is in direct conflict with the decision of the Circuit Court of Appeals of the circuit in which the court was sitting, and finds little or no support in any well-considered case from any other jurisdiction.

The cases upon which the District Court based its conclusions are prize and forfeiture cases. In such cases the United States has resorted to the aid of the court to procure the condemnation of vessels and had thus placed either the vessel or its proceeds in the

court for judicial administration. Claims against the vessel or the funds thus have been satisfied. *Carr* v. *United States*, 98 U. S. 433, 439.

In the Porto Rico cases cited, again the questions affecting title to real property ~~was~~ WERE presented, and the court adjudicated the interest of Porto Rico in and to such property. The Circuit Court of Appeals for the Second Circuit, in *Kingdom of Roumania* v. *Guaranty Trust Co.*, 250 Fed. 341, after reviewing these cases, points out that these (Porto Rico) cases "arose on quite a different state of facts." The court now is not asked to administer specific funds or to adjudicate rights to lands or property; the claim is a money demand on an alleged tort obligation. The government asked damages for collision losses; the owners of the *Thekla* asked money damages for collision losses based upon assumed *in rem* liabilities which are nonexistent. Any rules announced in prize court or forfeiture proceedings or in ejectment or other actions involving title to lands are not applicable to the situation which the present claims present.

CONCLUSION

We respectfully submit the first question certified must be answered in the negative. No affirmative decree can be entered under the cross libel, as the claim presented is premised upon the lien liability of an army transport for collision losses which is nonexistent. Again, such cross libel can have no better standing than it would have had as an original libel.

The claim could not have been sustained had it been presented by an original libel. Nor can a defendant, when sued by a foreign sovereign for money demands arising out of a tort, avail himself of any counterclaim and obtain an affirmative judgment upon a money demand for tort liability which such defendant may present. The Government has not consented to suit upon such claim, and ~~his~~ its public-vessel property is not subject to lien liability by reason thereof.

Respectfully,

JAMES M. BECK,
Solicitor General.
J. FRANK STALEY,
Special Assistant to the
Attorney General in Admiralty.

NOVEMBER, 1924.

In the case of the Keasbey Smelting Co. v. United States, this court on Monday last in an opinion by Mr. Chief Justice Taft (No. 57), ruled as follows:

"The objection to a suit against the United States is fundamental, whether it be in the form of an original action or a set off or a counter claim. Jurisdiction in either case does not exist unless there is specific Congressional authority for it."

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TABLE OF CASES.

Supreme Court of the United States

LUCKENBACH STEAMSHIP COMPANY, INC., and UNITED STATES OF AMERICA, against Norwegian Barque THEKLA, her tackle, etc.	October Term, 1924. No. 258.

Statement.

This case comes before the Court for answer to questions certified by the Circuit Court of Appeals for the Second Circuit. It arises out of a collision which occurred on the high seas on February 13, 1918, between the Norwegian barque *Thekla* and the American steamship *F. J. Luckenbach,* owned by the Luckenbach Steamship Company, Inc.

At the time of the collision, the *F. J. Luckenbach* was, as the certificate sets forth (pp. 3, 4),

"in the possession of the United States, manned by a crew selected by the United States Shipping Board and employed by the War Department in carrying army stores to France. The government possession was as owner *pro hac vice,* and resulted from a bare boat charter, made by the Luckenbach Steamship Company to the United States. Said

charter contained, among other clauses, the following:

'SECOND: The United States, at its sole expense, shall man, operate, victual and supply the vessel.

'THIRD: The United States shall pay all port charges, pilotages and all other costs and expenses incident to the use and operation of the vessel.

'FOURTH: The United States shall assume war, marine and all other risks of whatsoever nature or kind, including all risk of liability or damage occasioned to other vessels, persons or property.'"

As between the Luckenbach Steamship Company, Inc., and the United States, the latter was, therefore, solely responsible for the damage sustained by the *F. J. Luckenbach* and was bound to make that damage good; and the liability for the damage done to the *Thekla* also rested upon the United States, which had specifically agreed to assume all such risks.

On May 13, 1918, suit was brought against the *Thekla* in the United States District Court for the Southern District of New York to recover for the damages sustained by the *F. J. Luckenbach*. The libel was filed in the name of the Luckenbach Steamship Company, Inc., but the suit was stated to be "on behalf of itself *and the other owners* of the S/S *Luckenbach*" (p. 1), and there is no suggestion that there were any "other owners," except the United States.

The owners of the *Thekla* duly filed their claim and gave a stipulation for value. They then filed a cross-libel "against the S/S *F. J. Luckenbach* and against all persons lawfully intervening for their

interest therein" and moved under the then 53rd Rule in Admiralty* for a stay of proceedings until the libelant should "give security in the usual form, to respond in damages as claimed in the cross-libel" (p. 1).

That motion was granted on October 7, 1918, the order providing that "all proceedings on the original libel shall be stayed until such security shall be given." The original and cross-libel were also consolidated by the order of the Court and proceeded as one cause (p. 1).

On May 9, 1919, *after the order of consolidation,* the United States presented a petition to the Court and moved to be made "a party libelant." This motion was granted. The United States, however, never filed any further libel, but stood on the libel previously filed by the Luckenbach Steamship Company, Inc., on behalf of itself and the other owners of the vessel.

Thereafter the Government filed a claim as "owner *pro hac vice* of the S/S *F. J. Luckenbach,* intervening for the interest of itself" (p. 2).

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*Admiralty Rule 53, in force at the time, read as follows:

"ADMIRALTY RULE 53.
SECURITY ON CROSS-LIBEL.

Whenever a cross-libel is filed upon any counterclaim, arising out of the same cause of action for which the original libel was filed, the respondents in the cross-libel shall give security in the usual amount and form, to respond in damages, as claimed in said cross-libel, unless the court, on cause shown, shall otherwise direct; and all proceedings upon the original libel shall be stayed until such security shall be given."

After filing its claim and in order to vacate the stay, which was still in full force, the Government filed a stipulation for value reciting the filing of the cross-libel, the filing of the Government's claim, the ownership of the steamer by the Luckenbach Steamship Company, Inc., and the charter to the Government (p. 2). With reference to the charter, the stipulation stated that "the said steamship *F. J. Luckenbach* was * * * under requisition charter to, and in the possession of the United States, claimant, at the time of the collision upon which said libel is grounded, and for which the liability, if any, is that of the United States, acting through the United States Shipping Board Emergency Fleet Corporation, the operator of said steamship" (p. 2). The stipulation concluded in the usual form as follows:

"NOW, THEREFORE, the condition of this stipulation is such that if claimant herein" (i. e., the United States) "and the United States Shipping Board Emergency Fleet Corporation, the stipulator undersigned, shall abide by all orders of the court, interlocutory and final, and pay the amount awarded by the final decree of such court, or any appellate court, if an appeal intervene, then this stipulation shall be void, otherwise to remain in full force and virtue" (pp. 2, 3).

The United States did not file a separate answer to the cross-libel nor did it file any jurisdictional exception, but the Luckenbach Steamship Company, on October 3, 1919, filed what purported to be a combined answer and exception. In this pleading, the Luckenbach Steamship Company alleged that the cross-libel was not within the Court's jurisdiction (p. 3).

The case was tried on the merits, the United States Attorney appearing and conducting the trial for the United States.

The District Court held the *Luckenbach* alone to blame for the collision. The amount of the *Thekla's* damages was fixed and a decree entered for the amount against the United States and against the Emergency Fleet Corporation, claimant and stipulator (p. 4).

The Luckenbach Steamship Company thereupon dropped out of the case, pursuant to an order of severance (p. 4) and the United States alone appealed. The Luckenbach Steamship Company, therefore, is not a party to the case in this Court, nor was it a party in the Circuit Court of Appeals.

The Circuit Court of Appeals affirmed the finding of the District Court on the merits (p. 4), and certified to this Court two questions (p. 4):

"1. Was the District Court empowered by law to render the decree entered?

If the answer to the first question is in the negative—

2. Must the United States Shipping Board Emergency Fleet Corporation as stipulator respond for the damages of the *Thekla* as proven herein?"

Questions Involved.

The case, therefore, raises the question whether, when the Government has instituted suit for collision damage, a cross-libel has been filed, and the Government has undertaken to defend and has given security as a condition of being allowed to prosecute its own claim, the Court has jurisdiction to adjudicate the entire controversy thus presented, to determine which vessel was at fault, and to evidence that determination by a decree. In other

words, the question is, May the Government seek the judgment of the Court with respect to the collision and, if successful, collect its damages; but at the same time deny the right of the Court to give expression to its decision, if the Government's vessel is found responsible for the collision? May the Government say, "We want the Court's decision if it is in our favor, but we will not permit a decision to be rendered if it is against us"?

ARGUMENT.

I.

The United States has submitted itself to the jurisdiction of the Court.

From what has already been said, it appears that the right, if any, to recover the damages sustained by the *Luckenbach,* and the liability, if any, for the damages sustained by the *Thekla,* were throughout the right and the liability of the United States; that the Luckenbach Steamship Company, originally made a formal libelant apparently for some supposed tactical advantage, was subsequently dropped out of the case; and that the United States has, from the beginning, been the only real party in interest, as it is now the only party before the Court on the *Luckenbach's* side. The Government's brief (pp. 2, 3) clearly recognizes the fact that both the libel and the answer filed by the Luckenbach Steamship Company were filed on the Government's behalf.

The United States deliberately invoked the judgment of the Court below. Claiming that the *Thekla* was at fault for the collision, it

actively and affirmatively sought the judgment of the Court, asked to be made a formal party-libelant with full knowledge that a cross-libel was pending, filed its claim, took up the defense of the cross-libel and gave security for the recovery claimed therein. It accepted the condition originally imposed by the District Court while the Luckenbach Steamship Company was the only party named as libelant, namely, that security must be given for the cross-libel before the original libel could be prosecuted.

The position of the *Thekla* is (1) that, where the Government is the actor and asks the judgment of the Court with respect to a certain subject-matter, it submits itself, *quoad* that subject-matter, to the jurisdiction of the Court; (2) that, in such a case, the Government's affirmative liability, if any, may be determined; (3) that these principles are especially applicable to cross-suits in admiralty for collision, which form *one subject-matter;* (4) that the Government, having accepted the Court's condition and having appeared and given security, cannot, after having lost its case, reverse that action; (5) that a decree may be entered, liquidating and adjudicating the Government's liability; (6) and that, where a private corporation, the Emergency Fleet Corporation, which is admittedly suable, is before the Court as a stipulator, a decree may, in any case, be rendered against it.

The United States asserts: (1) that the District Court should not have recognized *any liability* on the part of the United States; and (2) that in any case no *decree* should have been entered against the United States.

Judge Mack, who heard the case in the District Court, wrote a very elaborate opinion (reported

under the title of *The Gloria,* 286 Fed. 188), in which, after a full review of the relevant authorities, he overruled the Government's contentions. He traces the historical development of the law of set-off and counterclaim and shows the steady development of that law away from its early narrow view of these subjects. His opinion is further discussed at pages 40-41, *infra.*

This Court has several times dealt with the right to render an affirmative decree against the Government, in cases where the Government has initiated the litigation, and has held that such a decree may be rendered. There is nothing in *The Western Maid,* 257 U. S. 419, in conflict with this principle—on the contrary, its existence is there clearly recognized.

(1) *Where the Government initiates the proceeding, the Court has jurisdiction to adjudicate on the entire subject-matter.*

In *The Western Maid* (*U. S.* v. *Thompson*), 257 U. S. 419, the question before the Court was whether private suitors might, in proceedings *initiated by them,* enforce maritime liens for collision with public vessels, after those vessels had passed into private hands.

It was there held that a private suitor could not enforce such a claim against a vessel which, when the collision occurred, was possessed or owned by the Government and was being operated by the Government for war purposes. This Court pointed out, however, that, when a sovereign voluntarily comes into court to enforce a right, he thereby consents to have full justice done, and

clearly indicated that a different result would have been reached, had the United States initiated the litigation as actor, in which case it would have been assumed that it would "submit to just claims of third persons in respect of the same subject-matter." On this point, the majority opinion, by Mr. Justice Holmes, said (pp. 433-434):

"Legal obligations that exist but cannot be enforced are ghosts that are seen in the law, but that are elusive to the grasp. The leading authority relied upon is *The Siren,* 7 Wall. 152. The ground of that decision was that *when the United States came into court to enforce a claim it would be assumed to submit to just claims of third persons in respect of the same subject-matter.* 7 Wall. 154; *Carr* v. *United States,* 98 U. S. 433, 438. In reaching its result the court spoke of such claims as unenforcible liens, but that was little more than a mode of expressing the *consent of the sovereign power to see full justice done in such circumstances.* It would have been just as effective and more accurate to speak of the claims as ethical only, but recognized in the interest of justice *when the sovereign came into court.* They were treated in this way by Dr. Lushington in the *Athol,* 1 W. Rob. 374, 328." (Italics ours.)

And see *The Nuestra Senora de Regla,* 108 U. S. 92, and *The Paquete Habana,* 189 U. S. 453 (*infra,* pp. 18-20).

The cases of *The Siren,* 7 Wall. 152, *The Davis,* 10 Wall. 15, and *The Western Maid,* 257 U. S. 419, while they employ varying teminology, all recognize that collision and salvage, even where government vessels or other property are involved, give rise to claims of some sort, whether described as "inchoate," or "legal but unenforcible," or "ethical only," and when the Government comes into court

as actor in a case involving such a claim, it opens the way for an adjudication by the Court—though not, of course, for enforcement by execution against government property.

The rule, then, being, as stated in the *Western Maid,* that, when the United States *comes into court to enforce a claim,* it will be "assumed to submit to just claims of third persons in respect of the same subject-matter," the only question before the Court in this case is whether the claim of the owners of the *Thekla* is a "just claim" "in respect of the same subject-matter."

(2) *Just claims.*

In determining what is and what is not a "just claim," the Court would ordinarily look for guidance to the general rules promulgated by the sovereign for its subjects; the sovereign, who has formulated these rules, may not assert that they are less than just. But in fact, the United States has expressly declared by statute that the collision rules shall be binding upon its public vessels—not only upon its subjects, but upon itself. It has, therefore, in the most solemn manner, recognized the justice of the rules in question and has definitely expressed its intention that its vessels shall obey them.

In October, 1889, in response to an invitation extended by the President of the United States to all the maritime nations, an international maritime conference was held at Washington to discuss and formulate uniform rules and regulations for preventing collisions. As a result of this conference, the so-called International Rules (Act of August 19,

1890, chap. 802, 26 Statutes at Large, 320) were passed by Congress.

Section 1 of this Act provides

"that the following regulations for preventing collisions at sea shall be followed by all *public* and private vessels *of the United States* upon the *high seas* and in all waters connected therewith, navigable by sea-going vessels." (Italics ours.)

If this does not show the sovereign's consent that public vessels be subject to that law, then the statute means nothing. The loss suffered by the owners of the *Thekla* was, as found by the Courts below, caused by infractions of these rules by the *F. J. Luckenbach*.

The manifest intention of Congress to make the rules binding upon public vessels is further indicated by the fact that, under certain circumstances, *ships of war* were granted an exemption for disobedience to the rules. Thus, Article 13 provides:

"Nothing in these rules shall interfere with the operation of any special rules made by the Government of any nation with respect to additional station and signal lights for *two or more ships of war* or for vessels sailing under convoy * * *." (Italics ours.)

(3) *"Subject-matter" the same.*

In the Government's brief it is insisted that the subject-matter of the cross-libel is the *lien liability* of the *Luckenbach* (pp. 8-10). This is, however, an obvious error. The "subject matter" of a case is quite independent of the question whether the libelant does or does not have a lien to secure his claim. Thus a libel for collision may be filed *in*

personam as well as *in rem;* also the libel may be *in rem* and the cross-libel *in personam,* and still the libel and cross-libel constitute one suit and the single question before the Court is, "Where does the responsibility for the collision rest?"

The subject-matter of a collision case is *the collision,* and in every such case the subject-matter of the libel and the cross-libel *must* be the same. This is clearly shown by the opinion of this Court in *Bowker* v. *United States,* 186 U. S. 135, a case of collision, where the Court said, at page 141:

"The cross-libel and the answer to the libel were consistent, *the subject-matter of the libel and the cross-libel was the same* and the latter, in no proper sense, introduced new and distinct matters."

(4) *Cross-suits for collision are one litigation and give rise to only one liability.*

When the sovereign sues for collision damage, he necessarily submits to the Court the question of fault on the part of both ships—his own as well as the other. The two are inextricably intertwined. It would be impossible for a Court to decide a collision case without examining the navigation of both vessels; and the sovereign must be deemed to consent to such action on the part of the Court when he starts suit and to submit himself to the Court's jurisdiction to that extent. This is especially true in the present case, where the Government's formal intervention occurred after the cross-libel had been filed and the suits consolidated and where, therefore, it was fully aware that the *Thekla* was claiming affirmative relief and where it actually gave bond to secure that claim.

It is well established by decisions of this Court that cross-libels for collision constitute but one litigation and that only one liability arises, even though both vessels are found to blame, and, in accordance with this principle, the present cases were consolidated and only one decree was entered (pp. 1, 4).

A striking illustration of the unity of such a litigation appears in *Bowker* v. *The United States*, 186 U. S. 135, where libel and cross-libel were filed in a collision case. A motion was made to quash the citation issued under the cross-libel, which citation had been served on the United States Attorney. This motion was granted, and the cross-libel was dismissed. The cross-libelant thereupon appealed to this Court, alleging that the jurisdiction of the District Court was in issue, but this Court held that a decree dismissing a cross-libel was not a final decree within the meaning of the statute, because the suit and cross-suit formed one litigation, and the decree did not finally terminate that litigation. The Court said (p. 139):

"But the litigation between the parties on the merits embraced the right of libelant to recover because of the fault of respondent, as well as the right of respondent to recover because of the fault of libelant, and, until the question as to which of the parties was at fault, or whether both were, is determined, that litigation cannot be said to have terminated."

See, too, the passage quoted at page 12, *supra*.

The same principle underlies the decisions of this Court in the cases involving the nature of the liability resulting from such cross-suits. These cases hold that, even where both vessels are to blame,

only *one liability* results—the cross-claims merge together, giving rise only to a single liability.

Thus in the *North Star,* 106 U. S. 17, a case of collision, where both vessels were to blame, the question was presented whether the claim of each vessel against the other should be treated as creating a separate liability or whether the cross-claims formed a single litigation so as to give rise only to a single liability for the excess of the damages of one vessel over those of the other. In adopting the latter view, this Court said (p. 20):

"When this resulting liability of one party to the other has been ascertained, then, and not before, would seem to be the proper time to apply the rule of limited responsibility, if the party decreed to pay is entitled to it. * * * The contrary view is based on the idea that, theoretically (supposing both vessels in fault), the owners of one are liable to the owners of the other for one-half of the damages sustained by the latter; and, vice versa, that the owners of the latter are liable to those of the former for one-half of the damage sustained by her. This, it seems to us, is not a true account of the legal relations of the parties. It is never so expressed in the books on maritime law. On the contrary, the almost invariable mode of statement is, that the joint damage is equally divided between the parties; or (as in some authorities), it is spoken of as a case of average."

And at page 22:

"These authorities conclusively show that, according to the general maritime law, in cases of collision occurring by the fault of both parties, the entire damage to both ships is added together in one common mass and equally divided between them, and *thereupon arises a liability of one party*

to pay to the other such sum as is necessary to equalize the burden. This is the rule of mutual liability between the parties." (Italics ours.)

At page 27 the Court referred to the District Court's power to consolidated cross-suits, pointing out that

"it clothes them with the necessary authority in cases of collision to combine the suits arising thereon into a single proceeding and, where both parties are found to be in fault, to make a single decree (as was done in this case) in accordance with their rights and obligations as resulting from the liability."

In the *Manitoba*, 122 U. S. 97, the rule was reaffirmed. The Court said, referring to the case of the *North Star, supra:*

"This Court, after a full examination of the subject, held that the proper rule was that, as each vessel was liable for one-half of the damage done to both, if one suffered more than the other the difference should be equally divided, and the one which suffered least should be decreed to pay one-half of such difference to the one which suffered the most, so as to equalize the burden. In other words, as both parties were in fault, the damage done to both vessels should be added together in one sum and equally divided, and a decree be pronounced in favor of the owners of the vessel which suffered most, against those of the vessel which suffered least, for one-half of the difference between the amounts of their respective losses. The House of Lords established the same rule in *Stoomvaart Maatschappy Nederland* v. *Penins. & Oriental Steam Nav. Co.*, 7 App. Cas. 795."

So, in the *Dove*, 91 U. S. 381, this Court discussed the effect of a cross-libel in a collision suit, saying (p. 385):

"It (the cross-libel) is brought in the admiralty *to obtain full and complete relief to all parties as to the matters charged in the original libel;* and in equity the cross-bill is sometimes used to obtain a discovery of facts.

New and distinct matters, not included in the original bill or libel, should not be embraced in the cross-suit, as they cannot be properly examined in such a suit, for the reason that they constitute the proper subject-matter of a new original bill or libel. Matters auxiliary to the cause of action set forth in the original libel or bill may be included in the cross-suit, and no others, *as the cross-suit is, in general, incidental to, and dependent upon, the original suit. Ayers* v. *Carter,* 17 How. 595; *Field* v. *Schieffelin,* 7 Johns. Ch. 252; *Shields* v. *Barrow,* 17 How. 145." (Italics ours.)

In *Stoomvaart Mattschappy Nederland* v. *Peninsular & Oriental Steam Navigation Co.,* 7 App. Cas. 795, the owners of a steamship which had been in collision, filed a petition to limit liability; and it became necessary for the House of Lords to decide whether there were "two cross liabilities in damages, of each shipowner to the other for half the loss which that other has sustained, or only one liability, for a moiety of the difference of the aggregate loss beyond the point of equality" (p. 801). The House of Lords, like this Court, adopted the latter view.

It was argued that "the cross claims of the two ships which had come into collision were as distinct as any two actions in different courts," but Lord Blackburn, in overruling this argument, said:

"The two claims arise out of one and the same accident. They are determined in one and the same Court, and they depend on one and the same question, viz. were both, or only one, of the parties to blame? and that question is determined once for all between the same parties. And the amount of the damages is also determined by the same Court and between the same parties. Even if the course of pleading had always been, as it appears latterly to have been, to condemn each separately, and order the damages to be assessed separately, I should still say that they were, in substance at least, *not distinct and separate actions* (7 App. Cas. 820, 821)." (Italics ours.)

Therefore, in determining whether this is a "just claim," to the adjudication of which the sovereign submitted by bringing suit, it is to be remembered (1) that the suit which the sovereign brought *necessarily involved* deciding as to the fault of *both vessels;* (2) that the questions as to the fault of both vessels, with the resulting legal consequences, were the *very subject-matter* on which the Government asked the Court's decision; (3) that the cross-suit is one litigation with the original suit and is "incidental to and dependent upon the original suit"; (4) that the suits had been consolidated before the Government asked to be made a formal party; (5) that, under settled principles, only *one* liability arose from the collision; and (6) that the sovereign has expressly subjected its public vessels to the collision rules. As stated in the *Dove, supra,* the cross-libel is resorted to merely "to obtain full and complete relief to all parties as to the matters charged in the original libel," and, as stated in the *Bowker* case, libel and cross-libel deal with the same subject-matter.

(5) *Additional authorities.*

With this background in mind, some of the other cases may be considered.

In the *Nuestra Senora De Regla,* 108 U. S. 92, the steamer had been seized by the United States during the Civil War, and the United States sought to condemn her as prize. The prize court held that there was no probable cause for the seizure and condemned the United States to pay over $300,000, *including interest* (108 U. S., at p. 98). In holding that a decree might properly be entered against the United States, the Court said (p. 102):

"Under these circumstances we cannot but think the United States have voluntarily submitted themselves to the court at the instance of the Spanish government, and with the consent of the claimant, for the purpose of having the questions of damages growing out of the capture judicially settled according to the rules applicable to private persons in like cases.

It is objected, however, that the executive department of the government had no power, in the absence of express legislative authority, to make such a submission. It was the duty of the United States, under the law of nations, to bring all captured vessels into a prize court for adjudication. If that had not been done in this instance, the Spanish government would have had just cause of complaint, and could have demanded reparation for the wrongs that had been done one of its subjects. The executive department had the right to bring the suit. In that suit it had been determined that the capture was unlawful. *Necessarily, therefore, the question of damages to the owner of the captured vessel arose.* * * * When, therefore, the United States, through the Executive of the Nation, waived their right to exemption from suit, and asked the prize

court to complete the adjudication of a cause which was rightfully begun in that jurisdiction, we think the Government is bound by the submission and that it is the duty of the court to proceed to the final determination of all the questions legitimately involved." (Italics ours.)

At page 103:

"It is true any judgment that may be rendered cannot be judicially enforced, but the questions to be settled are judicial in their character, and are incidents to the suit which the United States were required to bring to enforce their rights as captors."

In *The Paquete Habana,* 175 U. S. 677, the Court, having held that a fishing vessel was not subject to capture, directed (p. 714) that she be restored to her owner "with damages and costs." On the second appeal (189 U. S. 453) the Court's right to award damages against the United States was re-examined. There had been no diplomatic intervention, as in the *Nuestra Senora* case, and the question was therefore squarely presented whether the institution by the United States of the proceedings was such a submission as to warrant the Court in rendering an affirmative decree for damages. The Court, through Mr. Justice Holmes, said (pp. 465, 466):

"If we are right so far, we think that under the circumstances of this case a decree properly may be entered against the United States. The former decree of this court remains in force and requires a final decree for damages. *Re Potts,* 166 U. S. 263, 265; *McCormick* v. *Sullivant,* 10 Wheat. 192, 200. The decree must run against the United States if a decree is to be made. In *The Nuestra Senora de Regla,* 108 U. S. 92, 102, the court was of opinion that the United States had submitted to the juris-

diction of the court so far as to warrant the ascertainment of damages according to the rules applicable to private persons in *like cases*. It seems to us that the facts here are not less strong. Decrees in cases which disclose no special circumstances have been recognized by subsequent statutes providing for their payment. *Glen,* Blatchf. Prize Cases, 375, act of Feb. 13, 1864, c. 10, 13 Stat. 575; *Labuan,* Blatchf. Prize Cases, 165, act of July 7, 1870, c. 220, 16 Stat. 649; *Sybil,* Blatchf. Prize Cases, 615, act of July 8, 1870, c. 231, 16 Stat. 650; *Flying Scud,* 6 Wall. 263, act of July 7, 1870, c. 219, 16 Stat. 649. See also 16 Stat. 650, c. 232; 651, c. 234."

It will be observed that these cases do not merely adjudicate the priorities of conflicting claims against a *res* which the Government has brought into court. They are cases which apply the principle that, when the United States invokes the judgment of the Court with respect to a given subject-matter, the Court will adjudicate all the questions involved in that subject-matter, even though the result be an affirmative judgment against the Government; and will do so without express statutory authority and over the Government's objection. The cases completely dispose of the assertion that only Congress can waive immunity. That assertion is no doubt correct as applied to cases where a private claimant seeks to sue the Government, but it has no application to cases where the proper executive officers of the Government submit a controversy to the Court. In such a case, the Court will not treat the controversy piecemeal—it will decide it. The Government has no option to accept the decision if it is favorable or to deny the Court's right to enter a decree if it is adverse.

This is further illustrated by the case of *Porto Rico* v. *Ramos,* 232 U. S. 627. In that case, Ramos brought an action in ejectment against Wood for the recovery of certain lands and for damages. Wood moved that Porto Rico be made a co-defendant on the ground that the lands had escheated to Porto Rico. An order was entered accordingly, making Porto Rico a party defendant. Subsequently the Attorney General of Porto Rico appeared, represented that Porto Rico was an interested party, and the Court again ordered Porto Rico made a party. The complaint was amended accordingly so as to pray judgment against Porto Rico and the Attorney General appeared as its counsel. Porto Rico then raised by demurrer and by answer the contention that its sovereignty made it immune from suit. This contention was overruled.

The trial resulted in a recovery of the lands by the plaintiff and in an award to him of $6,000 damages against Porto Rico. In affirming the judgment, this Court, in a unanimous decision, said (pp. 631, 632):

"But one contention is argued, that is, that the District Court had no jurisdiction to entertain the suit against Porto Rico 'without its consent and against its active opposition.' *Porto Rico* v. *Rosaly,* 227 U. S. 270, is cited to sustain the contention. It was said in that case that the government 'established in Porto Rico is of such a nature as to come within the general rule exempting a government sovereign in its attributes from being sued without its consent.' This case, however, is not within the rule. In that case Porto Rico was a defendant in the first instance. In this case it voluntarily petitioned to be made a party, assert-

ing rights to the property in controversy, and, against the opposition of the plaintiff (defendant-in-error), it was made a party defendant. And this action was not improvident. Its Attorney General took time to consider. * * * His decision had the support of substantial reasons. The property came to Porto Rico as an escheat and came therefore as it was held by Eliza Kortright and Wood. If held in wrong by them, it was held in wrong by it, and the Attorney General may have considered it well worth while to face the controversy rather than remit it to some other proceeding that the plaintiff might institute, fortified, perhaps, by a decision in his favor. United States v. Lee, 106 U. S. 196; Stanley v. Schwalby, 147 U. S. 508. * * * Porto Rico, therefore, through its Attorney General, not only gave its consent to be a party to the cause but invoked and obtained the ruling of the court against the resistance of the plaintiff to make it a party to the cause. * * *

The complaint having been amended as moved and directed and nearly a year having elapsed, there came a change of view, *but the immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it and to come in and go out of court at its will, the other party having no right of resistance to either step.*"

Still less may a sovereign await the decision on the merits and then, if defeated, assert its own immunity.

No decision could be more explicit that a sovereign who intervenes in a suit may become subject to the entry of a money judgment against it, *although the Court has no express statutory authority to enter such a judgment.* Just as the Attorney General in the *Ramos* case may have thought it "well worth while to face the controversy" rather than to meet the claim later on in

another form, so the United States here, being under obligation to assume the collision liability, thought it wise to appear and have the controversy settled by a trial on the merits in which it could actively participate.

In *Richardson, as Treasurer of Porto Rico,* v. *Fajardo Sugar Co.,* 241 U. S. 44, an action to recover back a tax payment, the Treasurer of Porto Rico appeared by the Attorney General and answered the complaint. The Supreme Court said:

"A reversal of the district court's action is asked upon the theory that the proceeding is against Porto Rico, a government of sovereign attributes, which has only consented to be sued in its own courts. *Porto Rico* v. *Rosaly y Castillo,* 227 U. S. 270, 57 L. ed. 507, 33 Sup. Ct. Rep. 352. Whatever might have been the merit of this position if promptly asserted and adhered to, we hold, following the principles announced in *Porto Rico* v. *Ramos,* 232 U. S. 627, 58 L. ed. 763, 34 Sup. Ct. Rep. 461, that, having solemnly appeared and taken the other steps above narrated, plaintiff in error could not thereafter deny the court's jurisdiction. *Gunter* v. *Atlantic Coast Line R. Co.,* 200 U. S. 273, 284, 50 L. ed. 477, 483, 26 Sup. Ct. Rep. 252. The judgment is affirmed."

And in *Veitia* v. *Fortuna Estates,* 240 Fed. 256, at page 262, the Circuit Court of Appeals for the First Circuit said:

"The government established in Porto Rico by the Organic Act, 31 Stats. 77, 'is of such nature as to come within the general rule exempting a government sovereign in its attributes from being sued without its consent.' Porto Rico v. Rosaly, 227 U. S. 270. If, however, it voluntarily becomes a party to a suit involving its interests, upon the

application of its attorney-general, this is consent on its part, waiving such immunity, which consent and waiver cannot afterwards be withdrawn. Porto Rico v. Ramos, 232 U. S. 627."

In *Gunter* v. *Atlantic Coast Line R. R. Co.,* 200 U. S. 273, at page 284, this Court said:

"Although a state may not be sued without its consent, such immunity is a privilege which may be waived; and hence, where a state voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby, and cannot escape the result of its own voluntary act by invoking the prohibitions of the 11th amendment."

To the same effect:

Clark v. *Barnard,* 108 U. S. 436, at 447.

In *The Newbattle,* L. R. 10 P. D. 33 (1885), suit for collision was brought by the King of the Belgians, as owner of the steamship *Louise Marie,* a public vessel, against the *Newbattle.* The owners of the *Newbattle* appeared, gave bail, and filed a cross-libel. The question before the Court of Appeal was whether an order might properly be made requiring the King of the Belgians to give security to answer the cross-libel, or, in the alternative, staying proceedings under the original libel.

Brett, M. R., said (p. 35):

"It has always, however, been held that, if a sovereign prince invokes the jurisdiction of the Court as a plaintiff, the Court can make all proper orders against him. The Court has never hesitated to exercise its powers against a foreign government to this extent. It is another question as to

what may be the result of an application for execution by seizure of the plaintiffs' ship, if the judgment should be against the plaintiffs."

It will be noted that the Master of the Rolls felt no difficulty about entering judgment against the King of the Belgians on the cross-libel. The only point as to which he expressed doubt was whether such a judgment could be *enforced by execution.*

Cotton, L. J., said (p. 35):

"But when a government comes in as a suitor, it submits to the jurisdiction of the Court and to all orders which may properly be made. Regard must of course be had to the fact that in this case the King of the Belgians is a sovereign prince, but the order is nevertheless a proper one. It is a reasonable principle that a plaintiff whose ship cannot be seized, and against whom a cross action has been brought, shall put the defendant in the same position as if he (the defendant) were a plaintiff in an original action against a defendant whose ship could be arrested as security."

The statement of Lord Justice Cotton that the libelant in the cross action must be put in the same position as if he were suing "a defendant whose ship could be arrested as security," is an explicit holding that, when a sovereign institutes a collision suit and subsequently gives bail to answer a cross-libel, a decree may be entered and he may not escape by pleading his immunity. Lindley, L. J., concurred.

The decision in *The Newbattle* was approved in the recent case of *The Tervaete,* L. R. 1922, Prob. Div. 259, also a collision case. In that case, Bankes, L. J., said (p. 265):

"I think it may be conceded for the purposes of the argument that the fact that a sovereign or a sovereign power cannot be proceeded against in the Courts of a foreign country does not exclude all idea of liability for a breach of contract, or for a tort, in the sense that under no circumstances can the sovereign or the sovereign state do wrong. The rule that, where a foreign sovereign sues in the Courts of this country, proceedings may be taken against him in mitigation of the relief claimed by him, would be of no value except upon the assumption that claims for breaches of contract, or for torts, might be established and set off in mitigation. In *Imperial Japanese Government* v. *P. & O. Co.* (1895) A. C. 644, the whole discussion as to the Court in which proceedings might be taken would have been avoided had the law been that the Emperor of Japan could not be liable for damages resulting from the collision of his vessel with that of the defendants. The point was, however, not suggested in that case. In *The Newbattle,* 10 P. D. 33, it was assumed that the King of the Belgians might be held liable in damages in the cross-cause for the negligence of those in charge of his vessel, the *Louise Marie.*"

Lord Justice Scrutton said (p. 272):

"I agree that a sovereign may call upon us to enforce legal rights in his favour. *The Newbattle,* 10 P. D. 33, shows that if he does so, we may refuse to enforce those rights *unless he allows the legal rights we recognize to be effectively enforced against him.*" (Italics ours.)

The decision in *The Tervaete* was to the same effect as that in *The Western Maid;* and the above quotations show that those decisions are not in the least inconsistent with the right of the Court to proceed to judgment where the sovereign is the actor. *The Tervaete* is the most recent decision of an appellate court on the subject.

The principle that a sovereign, by instituting, or intervening in, a suit, submits himself to cross-libel is illustrated by the rule that, when a sovereign comes into court, he comes "not as a sovereign but as a suitor." He must be regarded as a litigant and is not entitled to special prerogatives, privileges and immunities. "When a sovereign sues, he brings with him no privileges which exempt him from the common fare of suitors" (*Walker* v. *United States*, 139 Fed., at 412). As stated in *U. S.* v. *Barber Lumber Co.*, 169 Fed. 184, at page 186:

"An individual cannot maintain an action against the government; but this exemption may be waived. So the government may voluntarily come into court, seeking relief against an individual. It comes, however, *not as a sovereign, but as a suitor. Within its own domain the court is supreme.* The government, having a controversy, may invoke the assistance of the courts; *but in entering their portals it voluntarily divests itself of sovereignty, submits itself to their jurisdiction, and consents to conform to their rules and abide by their decrees.*" (Italics ours.)

In *King of Spain* v. *Hullett*, 1 Cl. & F. 333 (House of Lords, 1833), the Lord Chancellor (Lord Brougham) said (p. 353):

"Though the King of Spain sues here as a sovereign prince, and is justly allowed so to sue, yet, beyond that, he brings with him no privileges that can displace the practice as applying to other suitors in our courts. The practice of the Court is part of the law of the Court."

In *Prioleau* v. *United States*, L. R. 2 Equity Cas. 659 (1866), the Court said (pp. 663, 664):

"Where the suitor is an individual, although he may be the sovereign of a foreign country, and may

of himself in reality represent the whole country of which he is sovereign, this Court has refused to acknowledge him when he comes here as a suitor in any other capacity than as a private individual. It has been determined by the highest authority, that he must conform to the practice and regulations for administration of justice of the tribunals to which he resorts for relief."

The recent European decisions are summarized in the Yale Law Journal (Vol. 33, pp. 420, 421) as follows:

"The Cour de Cassation of Belgium, following the distinction between acts *jure imperii* and *jure gestionis,* well said: 'If the foreign state can seize our courts of actions against its debtors, it ought to answer before them to its creditors,' and stated that the impossibility of execution did not affect the validity of a judicial decision. (*Chemin de Fer Liegeois-Limbourgeois* v. *State of Netherlands* [1903], Dalloz Jurisp. Gen. 2e. 401.) A similar position was taken by the German courts which allowed a set-off against the Russian Government but refused to permit execution on the affirmative judgment which was rendered. (*Von Hellfeld* v. *Russian Government* [1910, Royal Prussian Court for the Determination of Jurisdictional Conflicts], 5 Am. Jour. Int. Law, 490; *cf.* Van Praag, *Jurisdiction et Droit International Public* [1915], sec. 105.) In Germany also, the foreign state can be condemned to costs and is subject to a cross bill. (*Bardorf* v. *Belgian State* [1905, Oberlandgericht of Cologne] [1907], 34 Revue de Droit International Privé, 161, 165; [1905, Reichsgericht of Leipzig] ibid. 166, 168.) In France a sovereign's waiver may be express or tacit. When the sovereign brings suit, waiver is implied as to recoupments (citations omitted), appeals from judgments rendered in its favor, and costs. (*Ben Aiad* v. *Government of Tunis* [1896, Cour de Cassation],

1897 Dalloz Jurisp. Gen. Ire. 305; Despagnet, *Cours de Droit International Public* [4th ed. 1910], sec. 257; *cf.* Van Praag, *op. cit. supra,* note 24, sec. 105.) An affirmative judgment against the sovereign will issue on a recoupment. (*Leon Letort* v. *Ottoman Government* [1914, Tribunal Civil de la Seine], 5 Revue Juridique Internationale de La Locomotion Aerienne, 142.)"

And this conclusion is strengthened because, in the case at bar, the United States is not suing in its capacity as *parens patriae, i. e.,* to assert a right affecting public welfare, but in its *private capacity as a property owner.* It is well settled that when suing in the latter capacity, the Government has no privileges beyond those of private suitors.

In *Denver etc. R. R. Co.* v. *United States,* 241 Fed. 614 (C. C. A., 8th Cir.), the United States had brought suit against a railroad company to recover for damage done to timber due to a fire set by the railroad. A statute of Colorado, in which State the damage occurred, required that suits to recover for such damage must be brought within two years after the cause of action had accrued. The United States had neglected to bring suit within the time required by this statute and the question before the Court was whether this delay barred the claim. In holding that it did, the Court said (pp. 618, 619):

"It is established law that the government is not bound by any statute of limitations in a suit brought by it as a sovereign to enforce a public right, and the question at once arises, Is this such a suit? We think not, but rather a suit by it, as a body politic or artificial person having the power

to hold property as other persons, natural or artificial, to enforce a civil right. As a corporation or body politic the plaintiff may undoubtedly bring suit to protect its property located in any state, either in the state courts or in its own tribunals administering the same laws. As an owner of property it has the same right to have it protected by local laws that other persons have. *Cotton* v. *United States*, 11 How. 229; *Camfield* v. *United States*, 167 U. S. 518; *Bly* v. *United States*, Fed. Cas. No. 1518. Its rights and remedies in relation to its property are usually such as apply to other landowners within the state where the action is brought and it is to be treated like other persons owning lands therein and subject to local laws. *United States* v. *Smith*, 94 U. S. 214; *United States* v. *Stinson*, 197 U. S. 200; *Handford* v. *United States*, 92 Fed. 881; *Hemmer* v. *United States*, 204 Fed. 898; *United States* v. *Detroit Lumber Co.*, 131 Fed. 668. In *Walker* v. *United States* (C. C.), 139 Fed. 409, the court said:

'The underlying principle of all the decisions is that, when the sovereign comes into court to assert a pecuniary demand against the citizen the court has authority, and is under duty, to withhold relief to the sovereign, *except upon terms which do justice to the citizen or subject, as determined by the jurisprudence of the forum in like subject-matter between man and man.*'

And in *Mountain Copper Co.* v. *United States*, 142 Fed. 625, 73 C. C. A. 621, which was a suit to enjoin the continuance of a nuisance, the Court said (p. 629):

'In considering the case it is important to remember that the question to be determined is one between the United States and the defendant company only; the government suing, not in its sovereign capacity, but as a landowner, to enjoin alleged injuries to its property, not directly, but indirectly, through the maintenance of an alleged nuisance by the defendant on its own property.

* * * It is the well-established law that, when the government comes into a court asserting a property right, it occupies the position of any and every other suitor. Its rights are precisely the same; no greater, no less.'

From the foregoing and many other cases that might be cited to the same effect, it will be seen that in this class of actions the plaintiff has *no special privileges as a litigant.* Its rights are no greater, no higher, no better, and no less than those of an individual." (Italics ours.)

The sovereign, if he will, is free to consent to be subject to the law. He may evidence this consent, not only by a statute, but, as many cases already cited show, by instituting or appearing in a litigation. In the present case, the Government said: "A collision has occurred. We wish the Court to adjudicate the liabilities arising from it." The Government did this knowing that, by starting suit, it would submit itself to the jurisdiction, knowing that the fault of its vessel must necessarily be adjudicated, knowing that only one liability arises from such a litigation, and also knowing, when it asked to be made a formal party, that a cross-libel had been filed and had been consolidated with the original suit. The Government, as a condition of being allowed to prosecute its case, gave bond to secure the cross-libel. How can the Government, when the decision goes against it, deny the right of the Court to enter a decree? The *Thekla's* claim is a "just claim" relating to the same "subject matter" and is therefore one to which the Government is "assumed to submit." And it is, of course, much easier to presume the sovereign's consent *when he has expressly made the collision rules applicable to his own public vessels.*

Of course, the justice of the case is too plain for argument. It would be intolerable to allow the United States to invoke the court's aid to collect damages, if the other vessel were at fault, but to deny the jurisdiction of the court if the court's decision of the very question which the Government has asked it to decide should prove unfavorable. The unfairness of such a contention cannot be overstated. In cases where a private person undertakes to sue the Government for such a collision, the Government is no doubt entitled to set up its immunity; but, where the Government itself promotes the litigation and puts before the Court for adjudication a certain subject-matter, both in principle and under the overwhelming weight of authority, the Government cannot possibly deny the jurisdiction of the Court, because the decision happens to be unfavorable to it.

II.

The Government's Brief.

(1) *The liability of the Government to be sued.*

The contention made by the Government is clearly stated at the very beginning of its argument, in the following words:

"In limine, we submit as the predicate of our argument that the immunity of the Government (in this case a public vessel) from suit, except as by legislative action it consents to be sued, *is not merely a procedural immunity but an immunity from any legal obligation."*

It is conceded, of course, that no sovereign government can be sued without its consent, and, in this particular, this Court treats all sovereigns alike. The Government clearly goes too far, however, when it contends that the only way in which a sovereign can consent to be sued *"is by legislative action."* If that were true, we should find in the decisions of this Court no cases where judgments were entered against the United States except where there was a specific Act of Congress which authorized suit against the Government. That would accord precisely with Judge Ward's *dictum* in *Barendrecht Steamship Co., Ltd.* v. *United States,* quoted by the Government at pages 13-14 of its brief, but it is not the law as laid down by this Court. Thus, in *The Nuestra Senora de Regla, supra,* where the United States had seized a vessel as prize, a decree was entered against the United States for damages, when it was found that the seizure was illegal. Similarly, in *The Paquete Habana, supra,* this Court ordered a vessel, illegally captured, restored to her owner, "with damages and costs," Mr. Justice Holmes writing the opinion. Again, in *Porto Rico* v. *Ramos, supra,* the Government of Porto Rico, though recognized by this Court as possessing all of the attributes of sovereignty (*Porto Rico* v. *Rosaly,* 227 U. S. 270), was nevertheless denied the right to plead sovereign immunity, and an award was made for money damages against it. In *Richardson, as Treasurer of Porto Rico* v. *Fajardo Sugar Co., supra,* Porto Rico was again denied its sovereign right to claim immunity from suit. And the same rule was laid down in *Veitia* v. *Fortuna Estates, supra.*

There was no legislative authority for suit against the United States or against Porto Rico

in any one of the cases above referred to, and yet, in all of them, decrees were entered against a sovereign. The reason for this is perfectly clear and it is the precise fact which distinguishes this case from *The Western Maid.* There are *two* methods by which a sovereign government may submit itself to the jurisdiction of the Court. One is by statute. When that method is adopted, a private citizen may bring suit, but jurisdiction is conferred upon the Court only to the extent that the *Act* specifically confers it. The other method is for the Government to submit a case to the Courts on its own motion. In that event, the Government consents to have that particular case decided on its merits, as if it were one which involved private persons only. In other words, the whole of the case is submitted, not one side of it merely, and the Government retains no right of dictation and no power of veto which can thereafter be exercised over the Court, so far as *that* case is concerned.

The fact that the Government was the actor and voluntarily submitted its case to the Court is the reason, and the only reason, why decrees were entered against the Government in the Porto Rico cases and in the prize cases above referred to. It is impossible to distinguish the prize cases by merely saying that they are prize cases. The illegal seizure of a ship is a tort, as much as a collision. In the prize cases, suit was brought to justify the seizure under the rules of war, but the Court found that the seizure was tortious, and proceeded to determine the damages and interest and costs to which the owners were justly entitled. It is perfectly obvious that owners of the seized vessels could not have sued the United States *in the first*

instance, but, when the Government voluntarily entered the Court and submitted the case to it for the purpose of having the seizure declared legal, the Court had full jurisdiction and complete right to investigate the facts, to declare the seizure illegal and to award damages, with interest and costs.

Similarly, in all of the Porto Rico cases, suit could not have been brought against Porto Rico, in the first instance, by a private individual, but, when that sovereign government voluntarily appeared, for any reason whatsoever, the right of the Court to do full justice was, from that point on, wholly unrestricted.

The learned Solicitor General certainly will not claim that this Court should lay down one rule applicable to Porto Rico and another rule applicable to the United States.

(2) *The form of the cross-libel.*

The Government argues that, under the decision in *The Western Maid,* 257 U. S. 419, there was no lien on the *Luckenbach* and that, therefore, a cross-libel *in rem* cannot be maintained. This contention begs the question. The Government has immunity from an original suit for collision damage. This immunity extends also to the Government's public vessels in its possession and, under *The Western Maid,* equally to those vessels after they have passed out of its possession into private hands; but the immunity which attaches to such vessels is the immunity of the sovereign itself, and, if the sovereign has waived its immunity by submitting to the jurisdiction or otherwise, then the immunity is waived as much with respect to suits

in rem as to suits *in personam* (*The Siren,* 7 Wall. 152). The form of the proceeding makes no difference. Usually the cross-libel in such cases is *in rem,* but, as already noted, sometimes it is *in personam.* If the Government has submitted to jurisdiction *in personam,* precisely the same result follows with respect to a suit *in rem,* and *vice versa.* The question is not a question as to the form of the proceeding, but as to whether or not the *immunity has been waived.*

(3) *The 53rd Rule.*

The Government argues that the 53rd Rule cannot bring within the jurisdiction of the Court any matter which is not otherwise within its jurisdiction. In a sense that is true. An order under the 53rd Rule, for example, could not permit a cross-libel to compel specific performance of a contract to convey land, or for any other purpose outside the admiralty jurisdiction; but the fact that, pursuant to an order under the 53rd Rule, the Government *chooses* to appear and give security for the cross-libel, is additional evidence of submission to the jurisdiction. The institution of the original suit, followed by the election to give the security required by the Court as a condition of proceeding with the original suit, constituted a complete submission of the case.

It is stated in the Government's brief (p. 11) that "When the cross-libel was filed, before any action was taken, exception to the right to maintain such cross-libel was made and overruled." This, however, is a mistake. No exception was ever filed except that contained in the Luckenbach Steamship Company's pleading, and this not until

long after the stipulation for value had been given (Record, pp. 1-3). The Government, having submitted to the jurisdiction, could no more claim immunity by a subsequent pleading in this case than in the *Ramos* case, where precisely the same contention was urged. The Court had just the same power to render a decree here that it had to render judgment in the *Ramos* case. Indeed, in admiralty, the case is stronger, for the reasons already discussed.

(4) *Decisions cited by the Government.*

The quotation from the case of *Illinois Central R. R. Co.* v. *Public Utilities Co.*, 245 U. S. 493, taken out of its context, is quite misleading, as Judge Mack points out (286 Fed., at 202). In the *Illinois Central* case, the Interstate Commerce Commission had made an order regarding railroad rates and the officials of certain interested States threatened to prevent the carriers from obeying the Interstate Commerce Commission's order. Accordingly, the carriers filed bills against the State authorities (not against the United States or the Interstate Commerce Commission), asking injunctions against any interference on the part of the State authorities to prevent the carriers from complying with the order of the Interstate Commerce Commission. To these bills the State authorities filed cross-bills and they also sought to make the United States and the Interstate Commerce Commission parties to the cross-bills, in order to secure an injunction against the enforcement of the Commission's order. It will be observed that, so far as the Government was concerned, the cross-bills were really original bills and that the United States had

neither initiated the litigation nor submitted itself to the Court nor voluntarily taken any part in the suit. The cross-bills were not cross-bills at all, so far as the United States was concerned. This Court treated them in fact as original bills and said, at page 504:

"it is apparent that in subject matter and purpose they were suits to set aside the order. By statute, such suits are required to be brought against the United States (Judicial Code, Sections 208, 211) and the jurisdictional provision before mentioned permits them to be brought only in designated districts."

Since the bills before the Court were not in the designated districts, the Court dismissed them, and it was in that connection that it used the language quoted in the Government's brief. No question at all resembling that now before the Court was involved or discussed in the *Illinois Central* case.

The Government refers to only two admiralty cases. In the first of these, *Barendrecht Steamship Co., Ltd.* v. *U. S.*, 286 Fed. 387, a collision had taken place between the dredge *Atlantic,* owned and operated by the United States, and the *Barendrecht,* which was in tow of the tug *Catherine Moran.* The first libel was filed by the owners of the *Barendrecht* against the *Catherine Moran,* charging her with fault for the collision. The United States then filed a libel against the *Barendrecht* and the *Catherine Moran* to recover the damages sustained by the *Atlantic,* and the owners of the *Barendrecht* thereupon filed a cross-libel against the United States, which appeared specially and excepted to the cross-libel on the ground that the Court was without jurisdiction. Apparently

these exceptions were reserved for decision until the trial.

When the case came to trial on the merits, the District Court found that the *Atlantic* was free from fault. The Court's remarks with reference to the cross-libel were, therefore, merely *dicta*. The case, at most, is only a decision of the District Court, and the Court does not discuss nor even mention such cases as *The Western Maid, The Paquete Habana, The Nuestra Senora de Regla* and *Porto Rico* v. *Ramos*. The considerations which are now urged were not drawn to the attention of the District Court at all.

The other admiralty case referred to is *Bowker* v. *U. S.*, 105 Fed. 398, a decision of the District Court in New Jersey. The Court there decided that process under the cross-libel could not be served on the District Attorney, saying:

"There is no law authorizing the service of this writ on the United States District Attorney and such service must be set aside."

The rest of the Court's opinion seems merely *dictum*. It was the expression of a District Judge long before the present rule was formulated. Here again the authorities just referred to are not discussed or mentioned and, indeed, with the exception of *The Nuestra Senora de Regla*, they had not at that time been decided.

In *Kingdom of Roumania* v. *Guaranty Trust Co.*, 250 Fed. 341, the Circuit Court of Appeals decided merely that what was, in effect, an original suit against the Kingdom of Roumania could not be maintained. It recognized that, under the

cases of *Porto Rico* v. *Ramos*, 232 U. S. 627, *Richardson* v. *Fajardo Sugar Co.*, 241 U. S. 44, and *Veitia* v. *Fortuna Estates*, 240 Fed. 256, the immunity of the sovereign might be waived without legislative action where the sovereign appeared and submitted to the jurisdiction of the Court.

Reference is also made in the Government's brief to *Ex parte In the Matter of the State of New York, etc.*, 256 U. S. 490. There, suit *in rem* was brought against certain tugs which, at the time of the matters complained of, had been under charter to the Superintendent of Public Works of the State of New York, acting in his official capacity. The owners of the tugs sought to petition in the Superintendent and it was held that this could not be done, since it was in reality a suit against the State of New York. Here, again, there was no question of any submission to the jurisdiction by the sovereign in question.

The other cases referred to by the Government are old decisions at common law where the Federal Courts have refused to entertain counterclaims against the United States. They are fully discussed by Judge Mack, 286 Fed., at 202, and further comment on them seems superfluous.

After a discussion of these early cases, Judge Mack's opinion continues (286 Fed., at 200):

"*The Nuestra Senora de Regla*, 108 U. S. 92, and *The Paquete Habana*, 189 U. S. 453, mark a considerable advance in the views of the court. Both of these were prize cases; both were cases of wrongful seizure by the government. And in both cases the court rendered, on the counterclaim filed, an affirmative decree in favor of the claimant and against the government as libellant. It may be

possible to urge that a peculiar rule obtains in prize cases, but it is difficult to say that the court based its decisions on any such narrow ground. Indeed in *The Paquete Habana*, counsel for the claimant, apparently fearing that the court might draw back from the broad ground taken in *The Nuestra Senora de Regla*, argued that the claim of the owner of the vessel seized was simply for restitution of the property or its cash equivalent. The Court did not, however, adopt any restricted theory of this kind. *It placed its decisions on the broad principle of modern law that the government having come into the court, the court would determine all questions necessary for the disposition of the entire controversy. That being the case, the Court properly embodied its determinations in the form of a decree. It distinguished, what it had failed to distinguish in the earlier cases, the rendering of an affirmative judgment or decree from its enforcement or execution.*" (Italics ours.)

The fact that the cases relied on by the Government were at *common law* should not be overlooked. Such cases lack the distinctive feature of a collision suit in Admiralty, where there is *only one liability*, and where the object of the cross-libel is merely to "obtain full and complete relief to all parties as to the matters charged in the original libel" (*supra*, pp. 12-17). Judge Mack recognized this when he said (286 Fed., at 203):

"*Even if the common law precedents compelled a different decision in analogous circumstances at law, I should hesitate to extend those precedents to admiralty.* Cf. *The Pesaro, supra.* If the cross-libel were denied in admiralty, unusually complicated problems as to the division of damages and *res adjudicata* would arise in cases of mutual fault."

It is not necessary, in the present case, to go the length of holding that an affirmative decree may be entered against a sovereign in an action at law. The peculiar nature of cross-suits in admiralty has received full recognition from this Court in *The Dove,* 91 U. S. 381; *The North Star,* 106 U. S. 17, and *The Manitoba,* 122 U. S. 97 (*supra,* pp. 14-16). That only one liability arises is clearly settled; that the Court's decision in such a case must of necessity adjudicate that liability is obvious; and every consideration of convenience, of justice and of precedent requires that the liability be liquidated by the Court.

The *Paquete Habana,* 189 U. S. 453, holds squarely that, when the United States comes into court, it submits itself to counterclaims with respect to the same subject-matter; that when the United States files a libel and thereby seeks to have a vessel condemned, it subjects itself to a claim for damages if it appears that it, and not the vessel libeled, was at fault. The *Western Maid,* 257 U. S. 419, expresses the same view. It is submitted that no other result should be reached in the case at bar.

III.

The District Court was right in rendering a decree in favor of the cross-libelants.

Cases are numerous where decrees for money damages have been entered against sovereigns, although there was no statutory authority giving the Court the right so to do. Many of these authorities have already been referred to, and it is

unnecessary to repeat them. See *The Nuestra Senora de Regla,* 108 U. S. 92; *The Paquete Habana,* 189 U. S. 453; *Porto Rico* v. *Ramos,* 232 U. S. 627.

The English decisions of *The Newbattle* and *The Tervaete,* also referred to *supra,* indicate that the Court had power to entertain a cross-libel and to enter a decree thereon.

And there is another reason why the decree of the District Court against the United States should be affirmed.

The United States was not compelled to file a claim or stipulation. If it deemed the stay granted under the cross-libel erroneous, it could have applied for a reargument or could have presented a petition for mandamus or prohibition (as in the *Western Maid*). Instead of so doing, it chose to file its claim and bond. The decree against the United States, therefore, is founded not alone upon the collision, but also upon the voluntary act of the United States in prosecuting this litigation and in filing a bond in which the United States as claimant and the United States Shipping Board Emergency Fleet Corporation *agreed* "to abide by all orders of the Court, interlocutory and final, and to pay the amount awarded by the final decree of said Court, or any Appellate Court, if an appeal intervene * * *" (fols. 88-89). As said by the Supreme Court in *Porto Rico* v. *Ramos,* 232 U. S., at 632:

"The immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it, and to come in and go out of court at its will, the other party having no right of resistance to either step."

IV.

The damages of the *Thekla* should be evidenced by a decree, even though that decree cannot be enforced.

Even if it should be held that the owners of the *Thekla* are not entitled to a decree which can be enforced against the Emergency Fleet Corporation, nevertheless the Court should enter a decree which will make official record of the amount of the loss which has been sustained in connection with this collision.

So far as the merits of the case are concerned, it has been definitely determined that the *F. J. Luckenbach* was solely at fault for the collision. The finding of the District Court to that effect having been affirmed by the Circuit Court of Appeals (Record, p. 4), that part of the case is no longer open for discussion. It must also be assumed, therefore, that this claim eventually will be paid by the United States. In the Government's brief in *The Western Maid* (p. 37), the learned Solicitor General, after commenting upon the fact that there were pending many admiralty cases similar to *The Western Maid,* said:

"Congress, by appropriate action, has always provided relief for claims relating to war losses. It must be assumed Congress will properly provide redress in each of these cases when and as it considers it proper to do so."

When the time for payment comes, the damages due the owners of the *Thekla* must be liquidated in some way, and it is submitted that, in fairness to them, the liquidation of those damages which

has already been made by the District Court should be allowed to stand.

The proceedings before the District Court and the Circuit Court of Appeals have been both long and costly and the record of those proceedings will be wholly incomplete if it does not show *both* the fault of the *Luckenbach and* the amount of damages sustained by the owners of the *Thekla;* and these facts can be evidenced only by a decree.

It is, of course, conceded that a decree against the United States cannot be enforced by execution. But such a decree is the proper expression of the Court's decision of the question which the Government wanted it to decide, and as Mr. Justice Hill remarked in the case of *The Neptune,* 1919 Prob. Div. 17, 20, it is to be supposed that, if the Court finds that the Government is under a liability, the Government will pay it.

V.

Interest and Costs.

In a suit of this character interest is proper.

As already suggested, this is not a case where the Court is construing a statute which allows suit by a private person against the Government and where the only right which the libelant has must be found in the act. Here the consent of the Government, arising from its voluntary submission of the case, is assumed to be adequate to allow the Court to do full justice to *both* sides. The Court will not allow the Government to say, "We submit the case for just decision and ask for damages, interest

and costs, but if the other side is right, you must allow them only damages."

In *The Nuestra Senora de Regla, supra,* a large award of interest was made against the United States. The vessel had been seized at Port Royal, South Carolina, and was used by the Government for some months before any judicial proceedings were begun against her. While such proceedings were pending, she was turned over to the Navy Department and thereafter retained by it. When the case came on for trial, the Court made an order of restoration, on June 20, 1863, but the Navy nevertheless kept the vessel. The Government was held liable for the full value of the vessel and also for demurrage for loss of her services during the period between the seizure and the institution of judicial proceedings. After the order of restoration, there was a delay of nearly ten years before the damages were fixed, but interest was held to run from the date of the order of restoration.

It is submitted that this decision fully justifies the award of interest in the present case.

The allowance of interest was also sanctioned in *The Paquete Habana,* 189 U. S., at 467.

In the case of *Porto Rico* v. *Ramos, supra,* interest from the date of judgment was allowed, as appears from an examination of the printed record on file in the office of the Clerk of this Court (Transcripts of Records, 1913, Vol. 58, p. 17).

If, as stated in *The Paquete Habana* (189 U. S., at 465), the "rules applicable to private persons in like cases" are to be adopted, the award of costs would seem proper and costs were allowed in *The Paquete Habana* (175 U. S., at 714). The Eng-

lish practice also is to award costs against a public vessel found in fault (*H. M. S. Swallow,* Swab. 31).

VI.

Liability of the Emergency Fleet Corporation.

With reference to the Emergency Fleet Corporation, it seems necessary to say only that it was acting for the United States in the operation of the vessel (p. 2); and that it is a private corporation, which is not entitled either to sovereign immunity or to any special treatment in the matter of either interest or costs.

> *Sloan Shipyards* v. *United States Shipping Board Emergency Fleet Corp.,* 258 U. S. 549.

VII.

The first question should be answered in the affirmative. The second question, if answered at all, should be answered in the affirmative.

New York, October 25, 1924.

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